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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 518

W. L. GOOGINS,

Petitioner,

vs.

E. W. HABLE & SONS

On Petition for Writ of Certiorari to the Court of Civil Appeals for the 10th Supreme Judicial District of Texas

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Argument	3
Cases relied upon by Petitioner	11
Conclusion	13
Appendix	15
Statute Involved	15
Opinion in Marrow Mfg. Corp. v. Eitinger	17

CITATIONS

Cases: Pages

Alba Trading Co., Inc. v. Constants, 181 Misc. 778, 47 N.Y.S. (2d) 138 ..... 10, 11, 12

Armour & Co. v. Blindman, 73 F. Supp. 609 ..... 8, 9

Bledsoe v. Coxe Lumber Co., 229 N. C. 128, 48 S. E. (2d) 50 10

Bowles v. Franceschini, 145 F. (2d) 510, 513-514 5

Bowles v. Glick Bros. Lumber Co., 146 F. (2d) 566, 571 ..... 5, 10

Bowles v. Jones, 151 F. (2d) 21 10

Bowles v. Rogers, 149 F. (2d) 1010 10

Bowles v. Seminole Rock & Sand Co., 145 F. (2d) 482 10

Bowles v. Trullinger, 152 F. (2d) 191 8

Compania Importadera v. Caldwell, 58 N.Y.S. (2d) 745 ..... 4, 11, 12

Edsil Trading Corp. v. John Minder & Sons, 188 Misc. 1029, 70 N.Y.S. (2d) 229 10

Foley v. Day Bros. Inc., 320 Mass. 344, 69 N. E. (2d) 451 10

Grindle v. Brown, 321 Mass 182, 72 N. E. (2d) 431 10

Marrow Mfg. Corp. v. Eitinger, 185 Misc. 900, 58 N.Y.S. (2d) 11; affirmed 296 N. Y. 760, 70 N. E. (2d) 557 ..... 10, 11, 12

Marrow Mfg. Corp. v. Walco Bead Co., Inc., 296 N. Y. 764, 70 N. E. (2d) 558 10

Pittsburgh Fabric Products Co. v. Geller, 65 N.Y.S. (2d) 461 10

Porter v. Warner, 328 U. S. 395 ..... 8, 12

Speten v. Bowles, 146 F. (2d) 602 7

Tuskegee Homes Co. v. Oswalt, 26 So. (2d) 865 ..... 4, 11, 12

Statutes:

Emergency Price Control Act of 1942, as amended, Appendix 15

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Opinion Below

The opinion of the Court of Civil Appeals (R. 4-9) is reported at 237 S. W. (2d) 705. The opinion quotes in full the findings of fact and conclusions of law of the District Court. (R. 5-8), 237 S. W. (2d) at 706-707.

Jurisdiction

The Supreme Court of Texas denied rehearing of the application for writ of error October 10, 1951.

The petition for certiorari was filed in this Court on January 8, 1952. Petitioner has invoked the jurisdiction of this Court under 28 U.S.C., Section 1257(3).

Question Presented

Petitioner, a dealer, in the course of trade having purchased for resale commodities at over ceiling prices admittedly had no right of action under the Emergency Price Control Act. Did he nevertheless have a Federal right to recover the amount of the overcharge?

Statute Involved

The statute involved is the Emergency Price Control Act of 1942, as amended. Pertinent portions of the Act are copied in the Appendix, *post*, p. 15.

Statement

Petitioner claims that the courts below erred in not awarding damages in the sum of $15,060.00, the difference between the price paid and the alleged maximum price allowed by O.P.A. regulations for certain used or re-built heavy construction equipment.

"The equipment was not bought by the plaintiff for his own use, but was bought by him for purpose of re-sale." (Finding 11, R. 7.) Consequently, Petitioner did not buy such commodities "for use or consumption other than in the course of trade or business."

"The equipment was bought more than one year after the completion of the contract of purchase and sale aforesaid." (Finding 12, R. 7.) Consequently Petitioner did not bring the action "within one year from the date of the [alleged] violation."

By the terms of the Act the Petitioner was *not entitled* to bring an action for damages under the Act, and *because* he was not so entitled, the Administrator *was* empowered by the Act to bring such an action.

Argument

This action was not brought to recover damages that are said to be allowed by the Emergency Price Control Act. Petitioner does not claim that he purchased the equipment for use or consumption other than in the course of trade or business. He does not claim that he was within the class of persons entitled by the Emergency Price Control Act to "bring an action against the seller on account of the overcharge." Sec. 205(e).

Without undertaking to translate petitioner's contention we take it as he states it:

"Googins does not sue here for treble damages under the statute, but he asserts a statutory *right* to be charged properly or to be delivered the statutory warranty. The consequent damages, resulting from such cause of action, are fixed by the principles of common law." (Petition for Certiorari, 3.)

"Googins' claim here is like those in the above cases,[1] not based on the statutory remedy. It is the assertion of a common law right and is entirely independent of the statute. The statute defines the wrong; the common law provides the remedy for its breach. * * *

"When the Legislature gives a remedy for a right newly created, that remedy, of course, is conclusive. But where, as in this case, no remedy is provided in the statute the common law supplies the remedy." (Petitioner's Brief, 18.)

We propose to demonstrate that Petitioner's contention is devoid of merit, and presents no substantial Federal question.

The basic trouble with Petitioner's theory is that it leaves out of account the circumstance that while the statute denounces as unlawful the *sale* at the over-ceiling price, it also condemns as unlawful the act of *purchasing* at such price. A single sentence of the Act makes it unlawful for any person to sell, and for any person "in the course of trade or business to buy or receive any commodity" in violation of any effective price schedule under the Act. Sec. 4, 56 Stat. 28; 50 U.S.C. App. §904(a). *No violator is by the Act entitled to sue at all.* And if a buyer "is not entitled for any reason to bring the action the Administrator may institute such action on behalf of the United States within such one-year period." Sec. 205(e), 56 Stat. 34; 50 U.S.C. App. §925(e).

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[1] *Compania Importadera v. Caldwell* (S. Ct. N. Y. 1945), 58 N.Y.S. 745; *Tuskegee Homes Co. v. Oswalt* (Ala. 1946), 26 So. (2d) 865. As to these two cases, see *post*, p. 11.

The Act divides buyers into two classes: those who buy as non-commercial consumers, and those who buy as commercial consumers or traders. Those who fall within the first class are entitled to bring an action within a limited period. Members of the second class are *not entitled* to bring an action at all. Since by the Act they are not entitled to bring an action, the Act simply creates no cause of action in their behalf.

Petitioner confuses his asserted "statutory *right* to be charged properly" with the right of action for the overcharge after he has participated as a violator in the transaction. The former is accorded him, and the latter is denied him, by the Act.

Petitioner says: "The penalty provision in the Statute for treble damages did not exclude an action for recovery of actual damages, the amount to be determined at common law." (Petitioner's brief, 16.) But the statute is not merely a penalty statute. In behalf of those entitled by the Act to sue at all it creates a right of action in damages. The Court may allow a maximum of three times the amount of the overcharge. But the statute itself provides that the amount of damages "shall be the amount of the overcharge" if the defendant proves that the violation "was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation." Sec. 205(e); 50 U.S.C. App., § 925(e).[2]

[2] At the time of the trial of the present action (March 1950) the amendment of June 30, 1944 (Stabilization Extension Act of 1944), reducing the damages against a defendant in any action, under the facts above found, to the amount of the overcharge was applicable. *Bowles v. Glick Bros. Lumber Co.* (9th Cir.), 146 F. (2d) 566, 571; *Bowles v. Franceschini* (1st Cir.), 145 F. (2d) 510, 513-514.

Here the court has found that if there was a violation, "such was neither wilful on the part of the Defendant nor the result of his failure to take practical precautions." (Finding 13, R. 3.)

Assuming, contrary to fact, that petitioner purchased the equipment as a non-commercial consumer he could have brought a timely action and the damages would have been limited to the "amount of the overcharge."

He now contends that although he purchased the equipment in the course of trade and consequently was *not entitled* to bring an action under the statute, the statute nevertheless gives him the right to bring an action, in which by invoking common law remedies he may recover the "amount of the overcharge."

It is incorrect to speak of the statute as a penalty statute. Against defendant, not a wilful violator, the most that a non-commercial consumer could have recovered would have been the exact amount that the petitioner seeks to recover in the present action.

Petitioner's case then comes to this: although the statute *denies* him the right to recover the overcharge in an action for damages under the statute, it *gives* him the right to recover the same amount of damages in an action at common law. Unless this is his *claim*, he asserts no Federal right.

We have no occasion to answer the extended argument challenging the judgment and opinion below upon grounds wholly unrelated to the Federal statute. As to these non-Federal questions the highest court of the State has spoken. If these questions were now at issue, we should welcome the opportunity to discuss them. In this respect the State courts

stand in no need of defense. We undertake to answer petitioner's claim of Federal right.

In *Speten v. Bowles* (8th Cir.), 146 F. (2d) 602, cert. den. 324 U. S. 877, the Court remanded the cause to allow the defendant to prove if he could that his violation of the regulation was neither "wilful nor the result of failure to take practical precautions against the occurrence of the violation." This was for the purpose of enabling the defendant to reduce the damages to the amount of the overcharge if he could make the requisite proof. The right of the Administrator to prosecute the action was upheld on the ground that the purchaser, having bought the machinery for use or consumption in the course of his trade or business as a farmer, was not entitled to sue. In short, the Court held that the farmer was not entitled to sue at all and consequently the Administrator was entitled to bring an action for the overcharge. In the present case the petitioner occupies precisely the position that in the *Speten* case was occupied by the farmer purchaser. If by force of the statute the petitioner here is entitled to bring this action, it is hard to see why the Administrator was entitled to bring the action against *Speten*. Unless by force of the statute the petitioner here was entitled to bring this action he has no Federal right.

The Congressional intent to which the Act gives expression is that the non-commercial consumer, whose participation in an over-ceiling purchase is not condemned, shall have a measure of relief, but that the commercial consumer or dealer whose act of purchasing is declared to be unlawful, shall have no relief, at least none other than such as may flow

incidentally from an action by the Administrator. (It would be an obtrusion to inject here the question upon which the Court divided in *Porter v. Warner*, 328 U. S. 395.)

In *Bowles v. Trullinger* (9th Cir.), 152 F. (2d) 191 (1945), the court explained:

"At the hearings on Price Control Bill, House Report No. 5990 (77th Congress, 1st Session, 1941) page 141, it is evident that Congress intended to make a distinction between the two classes of buyers. It was pointed out in the hearings that a great deal more pressure was exerted on sellers by persons who buy in the course of trade or business, or for commercial reasons, and so the price regulations were made equally applicable to those purchasers. Since this type of purchaser had no right to sue the seller, the right to recover statutory damages for violation of the maximum price regulations in the case of industrial buyer or buyers in the course of trade or business was vested only in the Administrator. *Non-commercial consumers are the only ones empowered by the Act to bring suit for overcharge.* See also Senate Report 931, page 8, (77th Congress, 2d Session), and House Report 1658, page 26 (77th Congress, 2d Session.)" 152 F. (2d) at 192. (Emphasis added.)

The court held that since the purchaser was not a non-commercial consumer he had no right of action and that in consequence the Administrator was entitled to sue.

In *Armour & Co. v. Blindman* (Dist. Ct. Minn.), 73 F. Supp. 609 (1947), the action was by a non-consumer who purchased boxes at over ceiling prices without knowing that the prices were excessive, relying upon seller's assurance that the prices were not

excessive. The Court said that the question was: "Does Section 925(e) of the Emergency Price Control Act constitute the exclusive remedy available to purchasers of over-ceiling commodities?" 73 F. Supp. at 610. Answering, the court said:

"It cannot be seriously contended that, when Congress specifically termed a purchaser at overceiling price in the course of trade or business a law violator, it did not do so advisedly. * * *" 73 F. Supp. at 610.

"The clear intent of Congress to vest the Administrator with the exclusive right to institute suit where an overceiling sale is made to one in the course of trade or business, cannot be circumvented by any legal legerdemain in styling the action as one in equity to force one unjustly enriched to disgorge, or on the theory of breach of warranty or fraud. The right of action, regardless of the allegations contained in the complaint, is a creature of statute. It was unknown at common law and it is to the statute that we must look in order to determine what rights plaintiff has thereunder." 73 F. Supp. at 611.

Further:

"If plaintiff's position is sound, the defendants would not only be subject to a treble damage action by the Administrator, but to a single action by the plaintiff as well. To countenance, therefore, the action which plaintiff now seeks to sustain would do violence to the carefully planned legislation which Congress enacted for the purpose of defeating inflation. * * *" 73 F. Supp. at 612.

The construction of the Act in *Armour v. Blindman, supra*, fatal to the present petitioner's case, is supported by all of the Federal courts that have had

occasion to consider the question. It is supported also by all of the applicable State court cases with the exception of the two cases relied upon by petitioner, hereinafter noticed, *post*, p. 11. Some of the supporting cases are listed in the footnote below.[3]

Illustrative of the supporting State court decisions are *Foley v. Day Bros. Inc.*, 320 Mass. 344, 69 N. E. (2d) 451 (1946), and *Marrow Mfg. Corp. v. Eitinger*, 185 Misc. 900, 58 N.Y.S. (2d) 11, affirmed without opinion 296 N. Y. 760, 70 N. E. (2d) 557. Because it is apposite and completely answers petitioner's contentions, we reproduce in the Appendix Justice Pecora's opinion in *Marrow v. Eitinger*, *post*, p. 17.

In *Foley v. Day Bros. Inc.*, *supra*, plaintiff brought an action to recover damages under the Emergency Price Control Act for violation by defendant of maximum price regulations in the sale of a motor tractor. The court held that the Act and the amendment

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[3] Federal Court Cases: *Bowles v. Rogers* (and three other cases ruled by the same opinion) (7th Cir.), 149 F. (2d) 1010, *per* Judge Minton; *Bowles v. Seminole Rock & Sand Co.* (5th Cir.), 145 F. (2d) 482 (reversed on other grounds 325 U. S. 410); *Bowles v. Jones* (10th Cir.), 151 F. (2d) 21; *Bowles v. Glick Bros. Lmbr. Co.* (9th Cir.), 146 F. (2d) 566, certiorari denied because brief in support of petition is not "direct and concise," 325 U. S. 877.

State Court Cases: *Alba Trading Co., Inc. v. Constants*, 181 Misc. 778, 47 N.Y.S. (2d) 138; *Marrow Manufacturing Corp. v. Walco Bead Co., Inc.*, 296 N. Y. 764, 70 N. E. (2d) 558; *Pittsburgh Fabric Products Co. v. Geller*, 65 N.Y.S. (2d) 461; *Marrow Mfg. Corp. v. Eitinger*, 185 Misc. 900, 58 N.Y.S. (2d) 11, affirmed 296 N. Y. 760, 70 N. E. (2d) 557; *Edsil Trading Corp. v. John Minder and Sons*, 188 Misc. 1029, 70 N.Y.S. (2d) 229; *Foley v. Day Bros.*, 320 Mass. 344, 69 N. E. (2d) 451; *Grindle v. Brown*, 321 Mass. 182, 72 N. E. (2d) 431; *Bledsoe v. Coxe Lumber Co.*, 229 N. C. 128, 48 S. E. (2d) 50 (1948).

of June 30, 1944, "give the buyer of a commodity sold in violation of a regulation, order or price schedule prescribing a maximum price, a right of action against the seller, but only if the buyer buys such commodity 'for use or consumption other than in the course of trade or business.' *Otherwise only the price administrator can sue the seller.*" (Emphasis added.) 320 Mass. at 345, 69 N. E. (2d) at 452.

Cases Relied Upon by Petitioner

The two cases upon which petitioner relies as affording direct support for his contention are *Compania Importadera v. Caldwell* (S. Ct. N. Y. 1945), 58 N.Y.S. (2d) 745, and *Tuskegee Homes Co. v. Oswalt* (Ala. 1946), 26 So. (2d) 865 (Petitioner's brief, 16-18).

The decision in the *Compania Importadera* case has been overruled, in effect, by the New York Court of Appeals in *Marrow Mfg. Corp. v. Eitinger*, 269 N. Y. 762, 70 N. E. (2d) 557 (Nov. 27, 1946), which affirms, without opinion, the decision of the Supreme Court, *per* Pecora, Justice, 185 Misc. 900, 58 N. Y. Supp. (2d) 11.

In the *Compania Importadera* case Justice Walter said: "The conclusion here reached is inconsistent with *Alba Trading Co. v. Constants*, 181 Misc. 778, 48 N.Y.S. 138, and *Marrow Mfg. Corp. v. Eitinger*, 185 Misc. 900, 58 N.Y.S. (2d) 11; but all that I can say about that is to express my regret at finding myself in disagreement with one of my colleagues." 58 N.Y.S. (2d) at 750.

As to the case of *Tuskegee Homes Co. v. Oswalt, supra,* we comment:

(a) It was dismissed on demurrer. The plaintiff alleged that he purchased the lumber as a consumer, but the court deemed it unnecessary to decide that question. 26 So. (2d) at 870.

(b) The Alabama Court (June 1946) relied in part upon *Compania Importadera v. Caldwell, supra,* prior to the action of the New York Court of Appeals (November 1946) resolving the conflict between that case and the two cases of *Marrow Mfg. Corp. v. Eitingen, supra,* and *Alba Trading Co. v. Constants, supra.*

(c) Plaintiff alleged that defendant agreed to charge the legal O.P.A. price, and that plaintiff relied upon the invoices as representations that the price was legal. The court treated this as presenting a *prima facie* claim for the recovery of the overcharge whose payment was procured by a constructive fraud.

(d) The Court incorrectly construed *Porter v. Warner,* 328 U. S. 395, as supporting the view that if the Administrator can appropriately require restitution in a bill in equity, the purchaser is entitled to similar relief in an equity proceeding brought by him.

The two cases relied upon by petitioner, *Compania Importadera v. Caldwell, supra,* and *Tuskegee Homes Co. v. Oswalt, supra,* are completely answered by Justice Pecora in *Marrow Mfg. Co. v. Eitinger, supra,* affirmed by the New York Court of Appeals, Appendix, *post,* p. 17.

Conclusion

Petitioner complains of the action of the Texas courts in refusing to award damages in the amount of the claimed overcharge. Since the courts below found that the violation of the regulation by defendants "was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation," this is all that petitioner could have recovered if he had been a non-commercial consumer. Petitioner's asserted claim is precisely the claim that he would have had if he had been entitled to bring an action under the Act. By the terms of the Act he was not entitled to bring such an action. Consequently by the terms of the Act he was not entitled to recover the overcharge. By the judgment below he has been denied no Federal right.

We respectfully submit that the petition for certiorari should be denied.

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APPENDIX

Statute Involved

Pertinent portions of the Emergency Price Control Act are these:

Section 4:

"It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202(b) or section 205(f) (sections 922(b) or 925(f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing." Jan. 30, 1942, Ch. 26, Tit. I, §4, 56 Stat. 28, 50 U.S.C., War, Appendix, Sec. 904(a).

Section 205(e):

"If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In an action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the follow-

ing sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be banned from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered." U. S. Code, Title 50,—War, Appendix, Sec. 925(e); Ch. 26, Tit. II, Sec. 205(e), 56 Stat. 33; as amended by the Act of June 30, 1944, Ch. 325, Tit. I, Sec. 108, 58 Stat. 640.

The proviso in the Act reducing the damages to the amount of the overcharge if the defendant proves

that the violation "was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation" was added by the amendment of June 30, 1944. It was carried forward in the amendment of July 30, 1947. The record shows that the trial of the present action began March 16, 1950, and judgment was entered March 23, 1950 (R. 1). This was before the effective date of the Price & Wage Stabilization Act of September 8, 1950, although the above proviso was continued without change in that Act. 64 Stat. 811; 50 U.S.C., App. Sec. 2109(c).

Opinion in Marrow Mfg. Corp. v. Eitinger

Opinion (referred to *ante*, p. 10) in *Marrow Mfg. Corp. v. Eitinger*, 185 Misc. 900, 58 N. Y. Supp. (2d) 11, affirmed, without opinion, 269 N. Y. 762, 70 N. E. (2d) 557 (Nov. 27, 1946).

"Pecora, Justice:

"Defendant moves to dismiss the complaint upon the ground that it fails to allege facts sufficient to constitute a cause of action and that plaintiff has not the capacity to sue. The first cause of action is based upon the alleged improper and excessive price which it paid to defendant for merchandise covered by the Emergency Price Control Act of 1942, 50 U.S. C.A. Appendix §901 et seq., and the Maximum Price Regulations issued pursuant thereto. Recovery is sought for the difference between the amount paid and the maximum to which defendant would be entitled by law. In the second cause plaintiff seeks to recover the same amount upon allegations that defendant fraudulently misrepresented that the prices

charged for the merchandise were proper and legal, and determined in accordance with the Price Control Act and the Maximum Price Regulations; that plaintiff relied upon such representations and paid the excess sued for. Plaintiff does not allege that the merchandise was purchased 'for use or consumption other than in the course of trade or business.' It clearly appears that the commodity in question was sold 'in the course of trade or business.' It was held in *Lightbody v. Russell*, 293 N. Y. 492, 58 N. E. (2) 508, that where a commodity is purchased in the course of trade or business, the purchaser may not sue to recover treble damages under the Price Control Act, Section 205(e); 50 U.S.C.A. Appendix, §925(e). Plaintiff here does not sue for treble damages, since plaintiff did not purchase for use or consumption other than in the course of trade or business. This Court held in *Alba Trading Co., Inc. v. Constants*, 181 Misc. 778, 779, 47 N. Y. S. (2) 138, 139, 'that any remedy which exists * * * must under Section 205(e) be pursued by the Administrator and cannot be availed of by plaintiff, who is not a consumer-purchaser.' There too the suit, like the case at bar, was by a purchaser to recover the excess paid over the maximum price. Thus here too plaintiff may not sue to recover the excess. Any action for such purpose must be brought by the Administrator of the Office of Price Administration.

"By couching the second cause of action in terms of fraud, plaintiff cannot avoid the effect of such ruling. The remedy against a seller is statutory, based upon legislation with a definite public policy. Plaintiff was under the law duty bound to know, and will be presumed to have known, the maximum price. Recovery upon any theory can only be had in a suit brought by the Administrator. The recent decision in *International Spangles Corporation v. Marrow Mfg. Corp.*, 294 N. Y. 295, 62 N. E. (2) 77, in no way conflicts with the result reached. That case

merely holds that a seller who has violated the provisions of the Price Control Act may not recover the price of the goods sold where that price exceeds the maximum price fixed in conformity with the Price Control Act and the Maximum Price Regulations. It does not follow that because a seller who violates the law is barred from a recovery, that the buyer who has paid an excessive price can recover the excess. There are specific provisions in the Price Control Act which make it unlawful for a person to sell or deliver any commodity in violation of any regulation promulgated under the Act. To permit a seller to recover where the Act is violated would be tantamount to sanctioning the violation. But as to a purchaser's recovery from a seller, the Price Control Act prescribes an exclusive remedy. Suit by a purchaser can only be brought where he is a consumer. Plaintiff does not fall within that category and therefore may not pursue that remedy." 50 N.Y.S. (2d) 11, 12-13.